

Before the
Federal Communications Commission
 Washington, DC 20554

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 98-155
Table of Allotments,)	RM-9082
FM Broadcast Stations)	RM-9133
(Alva, Mooreland, Tishomingo, Tuttle, and)	
Woodward, Oklahoma))	

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To: Chief, Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**MOTION TO STRIKE**

Ralph Tyler ("Tyler"), by his attorneys, hereby respectfully moves to strike the "Reply to Opposition to Motion for Leave to Accept Opposition to Petition for Reconsideration" ("Reply to Opposition to Motion for Leave") filed by Chisholm Trail Broadcasting Co., Inc. ("Chisholm Trail"). In support of this Motion to Strike the following is shown:

Chisholm Trail missed the critical deadline of February 27, 2001, for filing an opposition to Tyler's Petition for Reconsideration in the above-referenced proceeding. Chisholm Trail submitted its late-filed Opposition to Petition for Reconsideration along with a self-serving "Motion for Leave to Accept Opposition to Petition for Reconsideration" ("Motion for Leave") on February 28, 2001.

Chisholm Trail in its Motion for Leave offers as its only excuse the following statement:

Chisholm Trail's Opposition was prepared and ready to be delivered to the FCC at approximately 2:00 p.m. on February 27, 2001. However, unbeknownst to Chisholm Trail or its FCC counsel, the courier service used by the law firm which serves as Chisholm

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Trail's FCC counsel did not pick up the Opposition from the law firm's mail room, and failed to deliver it to the FCC.

In his Opposition to Motion for Leave to Accept Opposition to Petition for Reconsideration ("Opposition to Motion for Leave") Tyler argued that since he was constrained by Section 405 of the Communications Act, as amended to meet the statutory 30-day filing deadline following public notice of the Commission's action, Chisholm Trail likewise should be constrained in the time it has to file an opposition. Further, Tyler argued that any waiver of a Commission rule would require a showing of good cause, which Chisholm Trail failed to make. As Tyler stated, "Neither Chisholm Trail nor its counsel has submitted a declaration from the courier service or the law firm's mail room (or from counsel, for that matter) explaining how Chisholm Trail and its law firm missed a critical filing deadline."

In its Reply to Opposition to Motion for Leave, Chisholm Trail submits three statements from individuals, whom Chisholm Trail claims possess direct knowledge concerning the untimely filing of its Opposition to Petition for Reconsideration. These statements and any reference to them in Chisholm Trail's Reply to Opposition to Motion for Leave should be stricken because (1) they are untimely filed, (2) were not made under penalty of perjury as required by the Commission's rules¹, and (3) two of the three statements are hearsay declarations made by individuals not competent to testify as to the matters set forth therein.²

¹ 47 U.S.C. §1.16.

² Chisholm Trail also submits as Appendix D to its Reply to Opposition to Motion for Leave documents which appear to be nothing more than a late filed supplement to its already late filed "Opposition to Petition for Reconsideration, these documents should be stricken and not made a part of the record in this proceeding.

In its Reply to Opposition to Motion for Leave Chisholm Trail claims that the “declarations” it belatedly submitted establish good cause to support its Motion for Leave. By way of excuse, Chisholm Trail states that its counsel “did not obtain the attached declarations to support its February 28, 2001, Motion for Leave because, as stated therein, the undersigned counsel did discover that Chisholm Trail’s Opposition to Petition for Reconsideration had not been filed with the FCC until approximately 11:00 a.m. on February 28th. At that time, Chisholm Trail’s counsel made every effort to ensure that the opposition pleading and accompanying Motion for Leave were filed with the Commission that same day.”³ This statement fails to explain why in its Motion for Leave Chisholm Trail did not ask for additional time to submit supporting declarations. Such supporting declarations and documents could have been provided in a few days. Instead it appears that Chisholm Trail decided to wait and see if Tyler would file an opposition. Only after Tyler filed his Opposition to Motion for Leave did Chisholm Trail make any attempt to demonstrate good cause for acceptance of its late-filed pleading. The Commission should not tolerate such gamesmanship. Chisholm Trail had its opportunity to timely and fully justify its reasons for submitting a late-filed pleading. Having failed to do so, any late-filed statements should be stricken from the record of this proceeding.

Chisholm Trail’s stated excuse that it did not obtain “the attached declarations to support its February 28, 2001, Motion for Leave” because its counsel was making “every effort to ensure that the opposition pleading and accompanying Motion for Leave were filed with the Commission that same day” is undermined by the very evidence Chisholm Trail is relying on to support its showing of good cause. Appendix A of Chisholm Trail’s Reply to Opposition to Motion for Leave is the “Statement for the Record” dated

³ Reply to Opposition to Motion for Leave, n. 3.

February 28, 2001 of Delphine Davis. Ms. Davis is identified in the Reply to Opposition to Motion for Leave as a legal assistant to Chisholm Trail's FCC counsel. In her Statement for the Record Ms. Davis claims that on February 27, 2001 she "called the CFS⁴ courier service around 2pm for a Portals filing pickup for the Federal Communications Commission." On February 28, 2001, according to Ms. Davis' statement, she received a call from the firm mailroom advising her that CFS had failed to pickup the Chisholm Trail filing. That same day, according to the Reply to Opposition to Motion for Leave, Ms. Davis drafted and executed the Statement for the Record. Why then did Chisholm Trail not attach the Statement for the Record along with its Motion for Leave? There are two possible explanations. First, Chisholm Trail's explanation as set forth in note 3 of its Reply to Opposition to Motion for Leave lacks candor. Chisholm Trail failure to make a properly supported good cause showing in its February 28, 2001 Motion for Leave was not the result of time constraints as claimed. It appears that it was not Chisholm Trail's intent to make a proper good cause showing. Only after Tyler filed his Opposition to Motion for Leave did Chisholm Trail make any attempt at a good cause showing. This explains why a document, which was supposedly in existence on February 28, 2001 and ostensibly supports Chisholm Trail's claim of good cause, was not produced on February 28, 2001.

The second possible reason Ms. Davis' Statement for the Record was not filed on February 28, 2001 was that it was not in existence on that date. As discussed above, Chisholm Trail apparently had no intention of supporting its good cause showing until after it had been served with an opposition to its Motion for Leave. It is likely that the Statement for the Record though dated February 28, 2001 was not prepared until some

⁴ Capitol Filing Specialists, L.L.C.

time after March 14, 2001, the date Tyler filed his Opposition to Motion for Leave. Here again there are two possible reasons for this action. First a statement dated immediately after an event is more credible. Ms. Davis, no doubt, has many duties as a legal assistant. She probably makes many phone calls. It is not likely that she could credibly remember making a routine telephone call to a courier service two weeks after it was supposedly made. Thus a Statement for the Record dated February 28, 2001, provides more support for Chisholm Trail's good cause showing than a document dated after March 14, 2001. The other reason for backdating the document becomes evident in the very nature of the Statement for the Record. This document, which was submitted to the FCC as evidence to support Chisholm Trail's late filed showing of good cause, was not executed under penalty of perjury as required by the Commission's rules.⁵ Chisholm Trail's failure to submit a properly attested declaration under penalty of perjury draws the negative inference that Ms. Davis was unable or unwilling to execute such a document under penalty of perjury.⁶ Ms. Davis may know as a fact that she did not call the courier service as claimed by Chisholm Trail and therefore was unwilling to risk signing a statement under penalty of perjury. By backdating the document and claiming that Ms. Davis drafted and executed the Statement for the Record "on her own initiative"

⁵ 47 U.S.C. §1.16. That section of the Commission's rules provides a specific form each declarant must execute, set forth in the rule as follows: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)." No such declaration was submitted with any of the so-called declarations submitted by Chisholm Trail. Though the so-called declarations of Ronnie Foreman and Dave Christian contain an affirmation that the "statements set forth above are true and correct to the best of my knowledge and belief."

⁶ See, *Washoe Shosone Broadcasting*, 3 FCC Rcd. 3948, 3953 (Rev. Bd. 1988). "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. WIGMORE ON EVIDENCE Sec. 285 (1940); see also MCCORMICK ON EVIDENCE Sec. 272 (1984) (espousing the "classic" statement of the law to be that "if a party has it peculiarly in its power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable")"

Chisholm Trail avoids drawing attention to the fact that Ms. Davis' statement was not made under penalty of perjury.

The statement of Ronnie Foreman supports the negative inference that Ms. Davis never called CFS.⁷ Mr. Foreman is the Managing Member of Capitol Filing Specialists, L.L.C. While much of Mr. Foreman's statement is hearsay he does clearly and competently state: "Our log book, in which we enter items scheduled for pickup and delivery each day, does not reflect a request from Ms. Davis on February 27, 2001." Mr. Foreman does not claim to have spoken with Ms. Davis on that day. If her story is to be believed who did she speak to? CFS, which also provides FCC related courier service to Tyler's FCC counsel, is a relatively small firm. There are only a handful of CFS employees that Ms. Davis could have spoken to. Why has she failed to identify whom at CFS she called?

Rather than try to explain what happened, Chisholm Trail instead launches an all out attack on the qualifications of CFS. According to Chisholm Trail "Mr. Christian's declaration establishes that this is the third time that Capitol Filing has failed to fulfill a pick up/delivery request at [Chisholm Trail's counsel's offices] within the past year." Mr. Christian's so-called declaration establishes no such thing. Setting aside temporarily that his declaration is not made under penalty of perjury, Mr. Christian has no personal knowledge concerning whether or not CSF has ever failed in its duties as a courier service. Mr. Christian merely states, "I have been advised that this is the third time that Capitol filing has failed to pick up a package for delivery to the FCC in the past 12 months."⁸ Mr. Christian so-called declaration does not even state who so advised him.

⁷ Reply to Opposition to Motion for Leave, Appendix C.

⁸ Reply to Opposition to Motion for Leave, Appendix B. (emphasis added)

Such statements are hearsay and have no probative value. His entire so-called declaration is likewise not based on personal knowledge, but on what he has been told. Mr. Christian has no knowledge as to what Ms. Davis may or may not have done or as to whom she may have spoken. He makes no claim to having participated in any of these alleged discussions. In fact Mr. Christian does not even claim to have been present in the mailroom during the critical period of February 27-28, 2001. Again a negative inference can be drawn that if all the facts were properly revealed they would contradict Ms. Davis's Statement for the Record.

Mr. Christian's statement that he has been "advised" that this is the third time that Capitol Filing has failed to pick up a package for delivery to the FCC in the past 12 months" further undermines Chisholm Trail's good cause showing. As stated, Tyler's FCC counsel uses the same firm for its FCC filings. CFS has never failed to timely pickup or deliver an FCC filing for Tyler's counsel. More importantly, should a courier service fail to properly deliver an important package that most likely would be the last time its services were used. At an absolute minimum, safeguards would be put into place to insure that such an even never occurred again. Yet, its counsel permitted the same failure in critical services to occur at least three times in one year without instituting any safeguards. Also Chisholm Trail fails to explain how an important package could have been left sitting in the mailroom overnight. If Chisholm Trail is to be believed, it cannot say that it did not have repeated notice that something was very wrong with the courier service it was using. In fact, Chisholm Trail's story that CFS failed in its duties three times in one year is so incredible as to not be believable.

Mr. Foreman states that “On one previous occasion, we experienced a similar situation in which a customer telephoned our office to make a pickup/delivery request, the request did not get entered into our log book, and Capitol Filing did not make the requested delivery.” Mr. Foreman’s statement seems to indicate that in the history of Capitol Filing one such event occurred. Nowhere does Mr. Foreman state that this has ever happened in the case of Chisholm Trail’s counsel and certainly not three times in the past twelve months. To the extent that Mr. Foreman and Mr. Christian’s statements can be considered testimony before the FCC, these statements are in clear and significant disagreement. At best, there are serious and continuing problems in the way Chisholm Trail’s counsel makes FCC filings. These continuing problems are of its own making and therefore do not constitute good cause for the acceptance of a late filed pleading.

There is another more troubling explanation. Chisholm Trail has based its entire good cause showing on the alleged failure of CFS to pickup the package. Therefore, it is reasonable to draw the negative inference that Chisholm Trail embellished its story by falsely claiming that the same or similar event occurred three times in the past twelve months. There is no evidence to support this serious allegation, only Mr. Christian’s hearsay statement claiming that he has been “advised” of CFS’ failure to properly pickup/deliver FCC filings.

In conclusion, Chisholm Trail has failed to make a sufficient good cause showing to justify the Commission’s acceptance of its late-filed pleading. More important, the evidence indicates that Chisholm Trail intentionally made material representations to the

FCC.⁹ If in fact that is the case, Chisholm Trail has forfeited its right to be a Commission licensee. The Commission should as expeditiously as possible set the matter for evidentiary hearing. A hearing is necessary because, without proper verification the FCC can no longer rely on any statements submitted by Chisholm Trail or its counsel.

Respectfully submitted,

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⁹ It is irrelevant where in the attorney-client relationship the breakdown in candor first occurred. In the end, Chisholm Trail, as the public trustee, is responsible for the reliability of the information and representations furnished by it to the Commission. *See, RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981) "The FCC has an affirmative obligation to license more than 10,000 radio and television stations.... As a result the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate."

CERTIFICATE OF SERVICE

I, Angela Y. Powell, a paralegal in the law offices of Smithwick & Belendiuk, P.C., certify that on this 9th day of April, 2001, copies of the foregoing Motion to Strike were sent via First Class Mail, postage pre-paid, to the following:

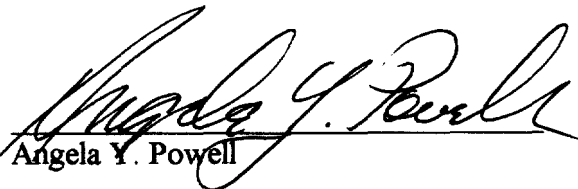
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